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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN AUGUSTIN SANCHEZ, Defendant and Appellant.	C084617 (Super. Ct. No. CRF165761)

Defendant Joaquin Augustin Sanchez was charged with two counts of inflicting corporal injury upon a person with whom he currently has or previously had a dating relationship (Pen. Code, § 273.5, subd. (a)),[1] false imprisonment with force or violence (§ 273, subd. (a)), misdemeanor child endangerment (§ 273a, subd. (b)), battery on a person with whom he has a dating relationship (§ 243, subd. (e)(1)), and misdemeanor

[1] Undesignated statutory references are to the Penal Code.

violation of a protective order (§ 166, subd. (c)(1)), with on-bail (§ 12022.1, subd. (b)) and strike (§ 667, subd. (d)) allegations. The child endangerment count was dismissed after the preliminary hearing. The jury found defendant guilty of the domestic violence and violating a protective order counts and acquitted on the battery and false imprisonment charges. The trial court sustained the strike and on-bail allegations, and, after denying defendant's motions for a new trial and to dismiss the strike, imposed a 12-year state prison term.

On appeal, defendant contends the trial court erred in denying his motion for a new trial based on *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] error, and in failing to grant his motion to strike the strike allegation. We shall affirm.

BACKGROUND

Prosecution

On May 19, 2016, R.B. was packing up the apartment where she had been living with defendant. R.B. was angry with defendant, who was sleeping instead of helping, so they argued. R.B. tried to call her father for help, but defendant took the phone from her and threw it. As the argument continued, defendant picked R.B. up and threw her to the ground, causing her to land on her elbow, injuring it. The police were called, and defendant was arrested. A few days later, defendant was served with a protective order not to harass, strike, assault, or annoy R.B.

Notwithstanding the protective order, R.B. and defendant resumed their relationship, got back together, and lived together in motels. On September 8, 2016, defendant, who was on drugs, grabbed R.B.'s neck like he was going to choke her and bit her on the arm during an argument. Defendant had grabbed R.B. by the neck in this manner many times before; R.B. told defendant she would leave if he did not stop doing this.

Sometime between 6:00 and 8:00 p.m., R.B. went to the El Tejon Motel in West Sacramento to pick up some belongings she was storing with a friend. As R.B. turned to

get her backpack and leave the room, defendant punched her in the face. Defendant grabbed her from behind and held her face down on the bed for about a minute. R.B. had a can of pepper spray in her hands; she had previously used pepper spray on defendant. Defendant did not let her go until she assured him she would not spray him. As a result of the attack, R.B. had a black eye for two-and-a-half weeks.

Past midnight on the following day, R.B. flagged down a police officer and told him about the incident. She had a bite mark on her left arm and one of her eyes was covered in a rag. R.B. uncovered the rag to show the officer her eye was bruised and swollen shut.

R.B. testified she kept pepper spray for protection because a man is stronger than a woman; she never intended to hurt defendant. According to R.B., defendant was "a very nice man, but when he's on drugs, he turns into a very demonic person," causing her to fear for her safety.

R.B. admitted being on drugs while she was dating defendant and to having a prior conviction for drug sales and a prior domestic violence conviction in Sacramento County. Unlike their effect on defendant, drugs did not alter her personality or memory.

Defense

Defendant testified on his own behalf. On May 19, 2016, he went to R.B.'s apartment after finishing a 10-month jail term. R.B. told him she was getting evicted, so defendant helped her pack. Defendant eventually went to sleep; R.B. went through his phone while he was sleeping. While holding a butcher knife, she woke up defendant and accused him of cheating. Fearing for his life, defendant kicked her out of the way. This caused R.B. to stumble, fall, and injure herself. He tried to leave but R.B. ran to the door in front of him, like a mad woman. Defendant then ran to the back room and tried to lock the door, but there was no lock on it, so R.B. tried to stab him through the door. When the police arrived after the neighbors called, R.B. put down her knife and ran to the door.

Defendant had barricaded himself in the bedroom and was afraid for his life when the police arrived.

Defendant stopped living with R.B. after this incident. At the time, R.B. bounced around from motel to motel. In July, she got in a rage and started scratching and throwing things at defendant. The police came and arrested defendant, but charges were later dropped.

R.B. called defendant in September and asked to meet in West Sacramento. She was homeless and told defendant she was pregnant and he may be the father. She appeared to be under the influence of drugs.

Defendant took R.B. to his friend Sharon's room at the El Tejon Motel. They got into an argument; when he turned to leave the motel room, R.B. pepper sprayed defendant, leaving him kind of blind. After Sharon told R.B. to leave, R.B. and Sharon started arguing and fighting. R.B. sustained the black eye in this fight with Sharon.

Defendant had seen R.B. carry weapons other than pepper spray such as a butcher knife, metal pipes, and screwdrivers.

Rebuttal

West Sacramento Police Officer Christopher Cobb responded to R.B. and defendant's apartment in the May incident. When he arrived, the back room door was completely open and defendant was sitting on the bed. A sweep of the residence found no knives, pepper spray, or other weapons. R.B. was shaking and crying and appeared very distraught. Defendant did not tell him he had been attacked with a knife and refused to make any statement without a lawyer present.

DISCUSSION

I

Brady Claim

A.

1.

Defense counsel began R.B.'s cross-examination by asking if she had "been convicted of domestic violence before." After the trial court overruled the prosecutor's relevance objection, R.B. answered that she had. Asked if it was against defendant or another male, she said it was another male. R.B. further explained, "And it was actually really supposed to be false. I had been harassed for two days, and I was in the home of his mother, and they had went against me on false accusations, so, yes, I was convicted, but I was falsely convicted of domestic violence." Asked in what county, she replied, "Sacramento County." Defense counsel also asked R.B. if she pleaded no contest or guilty in that case; R.B. did not remember. When asked if it was two or three years ago, R.B. replied, "Possibly."

Defense counsel asked R.B. if she remembered when she went to court and entered her plea. R.B. replied she did not. Counsel asked R.B., "You never went to court for it?" After the prosecutor's objection was overruled, R.B. replied, "No I don't. I'm not going to answer something I don't remember. It was years ago, and I was falsely accused, and it was -- it wasn't -- it wasn't something I did. I was falsely accused. It was three or four people against one person." Defense counsel also asked R.B.: "Do you remember being in court at some prior instance where you entered a plea for domestic violence, the same domestic violence conviction that you admitted a few minutes ago? Do you remember that?" R.B. answered, "I remember that no matter what I said, it was all his people against me, so it didn't matter." During further cross-examination, she said she did not remember if people came in and testified during that case, and that the police officers "forced" her to take the plea because they took the other people's word over hers.

Asked if this case resulted in any negative feelings, R.B. said, "No. Why are you asking me? Anything negative that has to do with anything has to do with my decisions. It doesn't have to do with court or anything." When counsel asked if she was taking responsibility for the domestic violence conviction, R.B. replied, "No. I am taking responsibility for the decisions I make."

R.B. also admitted on cross-examination to having a prior conviction for selling drugs. She served three months "[f]or having something in my possession"; she had come from Washington with marijuana and Ecstasy pills.

2.

Following the verdict, defense counsel asked for a continuance on sentencing to "verify whether or not the victim in the case had a case in Washington where, according to one source, [she]allegedly stabbed the victim in that case." The trial court granted the continuance.

At the next hearing, defense counsel informed the court of receiving paperwork regarding an undisclosed Washington conviction for R.B. and undisclosed paperwork regarding her Solano County cases. The prosecutor replied there was no failure to disclose as he disclosed the arrests. Regarding the Washington conviction, the prosecutor explained, "when I saw on the rap sheet it was Clark County, I assumed it was Clark County, Nevada. [¶] The defense, apparently, had more information than I did, being intimately familiar with the defendant, and they knew it was in Washington [¶] That -- so I disclosed what the offense was. I disclosed the county that it occurred in. I was wrong about the state, but as I said, the defense knew where to look for it and they did find it." According to the prosecutor, the information on R.B.'s warrants was not on her rap sheet; at defense counsel's request, the prosecutor ran R.B.'s rap sheet midtrial, but there were no indications regarding outstanding warrants.

Defendant filed a motion for new trial based on newly discovered evidence. The motion asserted that before trial, the prosecutor disclosed that R.B. had prior convictions

for theft in Sacramento County in 2009 and 2010, a 2013 Sacramento County conviction for possession of a controlled substance for sale, a 2014 domestic violence arrest not filed for lack of evidence, and a 2013 misdemeanor domestic violence conviction in Clark County, Nevada.

According to the motion, at the time of the prosecutor's disclosure, a disclosure of R.B.'s record was made by a different prosecutor to a deputy public defender in a different case. This disclosure included everything that was provided to defendant in this case. It also corrected the misdemeanor domestic violence conviction to taking place in Clark County, Washington, and disclosed a Solano County misdemeanor theft case from April 2015 that was still pending at the time of trial in this case. The motion further stated that neither prosecutor disclosed an additional Washington domestic violence conviction regarding disobeying a court order and "existing bench warrants for both Washington and the Solano County cases." Attached to the motion was a printout of an e-mail from the deputy public defender sent to defense counsel, in which R.B.'s criminal record is described as related in the motion. Based on this newly discovered evidence, defendant moved for a new trial.

At the hearing on the motion, defense counsel told the trial court he learned about the pending warrants from defendant's family. Counsel called the courts in Washington and Solano County; they confirmed the warrants existed. Counsel also found information on the Solano County warrants online. He argued the pending warrants may have explained R.B.'s reluctance to testify, but admitted it was unclear if she knew about them.

Counsel additionally argued he knew about the Clark County case at trial, but he would have looked like a fool if he tried to impeach R.B. with this conviction since it was not from Nevada but from Washington. When the prosecutor asserted that R.B. had admitted to the conviction on cross-examination, defense counsel replied R.B. did not admit to a Nevada domestic violence conviction. Being questioned only about a domestic violence arrest in Sacramento; she admitted only a conviction for drug sales in

Sacramento. Counsel further argued that knowing about the outstanding warrants would have allowed him to conduct cross-examination "a little differently and better."

The trial court ruled that the domestic violence evidence was cumulative and disclosure would not have led to a different result. The warrants presented a "more interesting situation." While R.B. was reluctant to testify, it was hard to say what the jury would do with that. While a person may not want to be around a courthouse as it would increase the chance of being picked up, the act of testifying does not further increase that risk. Finding disclosure would not lead to a different result, the trial court denied the motion.

At sentencing, defense counsel informed the trial court that defendant believed that R.B. used a knife in the Clark County, Washington domestic violence case. After the trial court said the jury was aware of the conviction, defense counsel replied R.B. was impeached on her possession of drugs for sale conviction and a 2014 California domestic violence case that did not result in conviction, but R.B. was not impeached on an out-of-state domestic violence conviction. The trial court denied the renewed motion, finding that even if the prior did involve the use of a knife, it would not have led to a different result.

B.

Defendant claims the failure to disclose the out-of-state priors and the outstanding warrants resulted in a *Brady* violation, mandating reversal. We disagree.

Under *Brady*, " '[t]he prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant' when the evidence is 'both favorable to the defendant and material on either guilt or punishment.' [Citations.] Evidence is 'favorable' if it hurts the prosecution or helps the defense. [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different." ' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 866.) "A 'reasonable probability' is a probability

sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682 [87 L.Ed.2d 481, 494].) "Moreover, the duty to disclose exists regardless of whether there has been a request by the accused, and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. [Citations.]" (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225.)

The defendant has the burden of showing materiality. (*People v. Hoyos* (2007) 41 Cal.4th 872, 918, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) We review a *Brady* challenge de novo—though the trial court's findings of fact are given great weight when supported by substantial evidence. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

Defendant's motion did not contain a record of R.B.'s criminal convictions. The only support for his claim of nondisclosure is a copy of an unsworn e-mail from another public defender relating the discovery in another case of R.B.'s criminal record, and trial counsel's statement in the new trial motion that he also found an additional Washington domestic violence conviction for disobeying a court order and outstanding warrants in Washington and in Solano County. Assuming this type of evidence could support a finding of *Brady* error, it nonetheless fails because, assuming R.B.'s record was as defendant's motion claims, defendant does not carry his burden of establishing materiality.

The defense was provided with discovery showing R.B.'s criminal record consisting of two theft convictions and one possession for sale conviction, all in Sacramento County, and the misdemeanor domestic violence conviction, which was incorrectly identified as taking place in Clark County, Nevada. Trial counsel cross-examined R.B. regarding her criminal record and got her to admit to doing a three-month term for the drug conviction and having a prior domestic violence conviction in Sacramento County. Defense counsel invoked R.B.'s domestic violence conviction to

start his closing argument as follows: "All of [the prosecutor's] evidence comes through the mouth of [R.B.] and her filter. We didn't know much about [R.B.] when this case began. I mentioned in my opening statement she has a prior domestic violence conviction. Now we know why. She has a prior domestic violence conviction because she has anger management issues." In spite of this, the jury rejected defendant's explanation of the domestic violence incidents and rendered guilty verdicts on the domestic violence and violating court order charges.

Defendant claims the prosecution's failure "to provide complete, accurate *Brady* materials precluded the defense from cross-examining the prosecution's star witness regarding the facts of the Washington prior conviction, and R.B.'s use of a knife during the commission of the crime." He claims the record undermines any conclusion R.B. was cross-examined on the Clark County, Washington domestic violence conviction because trial counsel did not learn of it until after the trial.

Defendant's claim is based on an assumption with no support in the record, that R.B. has a domestic violence conviction in California. The discovery provided by the prosecutor and the posttrial information given by the other public defender identify a single out-of-state misdemeanor domestic violence conviction in R.B.'s criminal record. The prosecution identified a 2014 *arrest* in an unspecified California county for violating section 273.5, but charges were never filed due to lack of evidence. Trial counsel's posttrial investigation likewise did not turn up any record of R.B. sustaining a domestic violence conviction in California.

Trial counsel had discovery of the out-of-state domestic violence conviction, albeit with an incorrect location, and the California domestic violence arrest. Counsel cross-examined R.B. on a domestic violence conviction and used her admission to a domestic violence conviction as the closing argument's foundation. It is not reasonably probable that a different result would occur if the prosecution had identified the correct location for R.B.'s domestic violence conviction. It is reasonable to infer that trial counsel did not

investigate the Clark County, Nevada conviction before or during trial, as any investigation presumably would disclose that no such conviction existed. The fact of the conviction, but not its location, was important to trial counsel. While R.B. incorrectly identified Sacramento County as the locus of her conviction, trial counsel did not press her on the inconsistency, relying instead on the fact that she had a domestic violence conviction. Counsel also did not cross-examine R.B. regarding the dismissed domestic violence arrest. Had the prosecutor identified the correct Clark County, the cross-examination and closing argument would have been the same, and the jury would reach the same result.[2]

Disclosure of the other materials, various outstanding arrest warrants and a Washington conviction for violating a court order in a domestic violence case, is not reasonably likely to lead to a different result. Arrest warrants are not convictions. While their existence may have given some context to R.B.'s reluctance to testify, her unexplained reluctance and her domestic violence prior are much stronger impeaching

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[2] We are also unconvinced by defendant's assumption that giving the correct location of the domestic violence prior would have allowed R.B.'s alleged use of a knife during the crime. The only evidence regarding this is the unsworn, posttrial hearsay from unidentified members of defendant's family, as related by trial counsel at sentencing. Even if we were to credit this evidence, the fact remains that trial counsel did not investigate R.B.'s domestic violence prior until after the trial. If the prosecutor gave the correct county for the domestic violence conviction, the alleged use of a knife in the Clark County prior would not have been discovered before the trial.

We also will not entertain a petition for rehearing based on the alleged ineffectiveness of trial counsel. A successful claim of ineffective assistance would require at minimum evidence that the Washington domestic violence actually involved the use of a knife. That fact is not supported by the appellate record; any such finding must be made on habeas corpus. (See *In re Bower* (1985) 38 Cal.3d 865, 872 ["when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right[,] resort to habeas corpus is not only appropriate, but required"].)

evidence. Likewise, a conviction for violating a court order, even in a domestic violence case, does not carry the weight of the prior convictions used to impeach R.B. Defendant has failed to carry his burden of proving materiality.

II

Romero Motion

Defendant contends the trial court abused its discretion in denying his *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 motion to strike the strike allegation based on a 2006 conviction for first degree burglary (§ 459).

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the

defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Our review of these considerations shows the trial court did not abuse its discretion in refusing to grant the *Romero* motion. The court's decision is not "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.)

Defendant was 19 when he sustained the 2006 first degree burglary conviction upon which the strike is based. He was given five years' probation for the 2006 conviction and sustained one probation violation in 2008. In 2007 defendant was given three years' probation following a misdemeanor conviction for petty theft with a prior (§ 666). Probation was terminated in both cases and defendant was sentenced to a two-year term when he was convicted of felony transportation of marijuana (former Health & Saf. Code, § 11360, subd. (a)) in 2009. Defendant's next conviction was for misdemeanor battery in the state of Nevada in 2012; he served a 63-day jail term. In 2014 he sustained a felony conviction for possession of a controlled substance (Health & Saf. Code, § 11350) which was subsequently reduced to a misdemeanor pursuant to Proposition 47. In 2015 defendant was placed on five years' probation with a 365-day jail term following his conviction for two felony counts of transportation of a controlled substance.

Defendant argues he was young when he committed his first offense and has not engaged in similar activity since 2006. Given these two factors, he concludes the denial of his *Romero* motion was an abuse of discretion.

Much of defendant's time since his 2006 serious felony conviction has been on probation, parole, or incarcerated. In addition, he failed to successfully complete his probation in the burglary case, and he has sustained three more felony convictions. While defendant's two current felony convictions are not classified as violent or serious,

they nonetheless involve domestic violence. It was not an abuse of discretion to deny the *Romero* motion based on defendant's criminal record and the nature of his current offenses.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

RENNER, J.